

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11	WILLIAM JOHN DAUGHTERY, CDCR)	Case No. 08cv0408-WQH (BLM)
12	#F-79985,)	
13	Plaintiff,)	ORDER DENYING <i>EX PARTE</i> MOTION
14	v.)	FOR RECONSIDERATION OF ORDER
15	DENNIS WILSON, San Diego Police)	DENYING APPOINTMENT OF COUNSEL
16	Officer; ESMERALDA TAGABAN, San)	
17	Diego Police Officer; SERGEANT)	[Doc. No. 20]
18	GRIFFIN; DETECTIVE LEMUS,)	
19	Defendants.)	
20	_____)	

On April 21, 2008, Plaintiff, who is proceeding *pro se* and *in forma pauperis* with a Complaint brought pursuant to 42 U.S.C. § 1983, filed a request for assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Doc. No. 13. This Court denied his request on April 23, 2008, finding that Plaintiff had failed to demonstrate the requisite "exceptional circumstances" to justify appointment of counsel. Doc. No. 14.

Plaintiff now seeks reconsideration of the Court's order. Doc. No. 20 ("Pet'r Mot."). In support of his motion, Plaintiff presents additional facts and argument, which he contends provide justification for alteration of this Court's prior findings and appointment of counsel. First, Plaintiff explains that he suffers from, and takes

1 medication for, clinical depression and anxiety. Id. at 3-4. According
2 to Plaintiff, these mental illnesses, coupled with the medications he
3 takes to treat them, impact his concentration, "rational processes" and
4 ability to "act as a normal person can act." Id. at 4. Second,
5 Plaintiff contends that several physical infirmities - some caused by
6 the alleged excessive force and some pre-existing - cause him constant
7 pain. Id. at 4-5. The pain, and the medication he takes to ease the
8 pain, allegedly impact Plaintiff's ability to concentrate, type and see
9 (in regard to this last symptom, Plaintiff claims that glaucoma causes
10 him to suffer eye fatigue, partial blindness, and headaches). Id.
11 Third, Plaintiff lists various pieces of evidence he will need in order
12 to pursue his case¹, which he argues may be unavailable to him without
13 the assistance of counsel. Id. at 5-7. For instance, Plaintiff
14 contends that without access to trial records and phone books, he cannot
15 locate and contact the civilian and police witnesses or find and hire an
16 expert witness. Id. Plaintiff also asserts that the prison will not
17 disclose medical or psychological records to inmates as a matter of
18 prison policy. Id. Finally, Plaintiff submits that he cannot
19 adequately pursue his case because he can only make collect telephone
20 calls (and people rarely accept the charges), he has limited access to
21 the prison library and no access to the internet or telephone books, and
22 he cannot afford to pay an attorney or the "jailhouse lawyers" who

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24 ¹ Specifically, Plaintiff states that he will require access to police
25 reports regarding the incident, an expert witness on the topic of police procedure, a
26 tape recording of the drug "sting" operation, two witnesses to the incident, all of the
27 officers involved in the incident, the green coat worn by Plaintiff and entered as an
28 exhibit at trial, photographs of Plaintiff taken after the incident, medical records,
and all of the transcripts and defense records from the underlying criminal trial.
Pet'r Mot. at 5-7.

1 prepared the instant motion. Id. at 7-10. In light of the totality of
2 these claimed "exceptional circumstances", Plaintiff contends that the
3 Court must appoint counsel to assist him. Id. at 9.

4 As this Court explained in its April 23, 2008 order, "[t]here is no
5 constitutional right to appointed counsel in a § 1983 action." Rand v.
6 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997) (citing Storseth v.
7 Spellman, 654 F.2d 1349, 1353 (9th Cir. 1981)); see also Hedqes v.
8 Resolution Trust Corp. (In re Hedqes), 32 F.3d 1360, 1363 (9th Cir.
9 1994) ("there is no absolute right to counsel in civil proceedings").
10 Thus, federal courts do not have the authority "to make coercive
11 appointments of counsel." Mallard v. United States District Court, 490
12 U.S. 296, 310 (1989); see also United States v. \$292,888.04 in U.S.
13 Currency, 54 F.3d 564, 569 (9th Cir. 1995) ("Appointment of counsel
14 under [28 U.S.C. § 1915] is discretionary, not mandatory").

15 District courts have discretion, however, pursuant to 28 U.S.C.
16 § 1915(e)(1), to request the voluntary assistance of counsel to
17 represent indigent civil litigants upon a showing of "exceptional
18 circumstances." Agyeman v. Corrections Corp. of America, 390 F.3d 1101,
19 1103 (9th Cir. 2004). Because the Court does not have a reasonable
20 method to compel or compensate counsel in such situations, it "will seek
21 volunteer counsel only in the most serious and exceptional cases."
22 Shelton v. Chorley, 2007 WL 3146999, *4 (E.D. Cal. 2007). "A finding of
23 the exceptional circumstances of the plaintiff seeking assistance
24 requires at least an evaluation of the likelihood of the plaintiff's
25 success on the merits and an evaluation of the plaintiff's ability to
26 articulate his claims 'in light of the complexity of the legal issues
27 involved.'" Agyeman, 390 F.3d at 1103 (quoting Wilborn v. Escalderon,
28 789 F.2d 1328, 1331 (9th Cir. 1986)).

1 Having reviewed Plaintiff's additional factual assertions and
2 arguments, the Court does not presently find that they present a basis
3 for reversing its prior decision. At this early stage in the
4 proceedings, the Court cannot make a determination as to whether
5 Plaintiff is likely to succeed on the merits. And, regardless of
6 whether he has done so on his own or with the assistance of "jailhouse
7 lawyers," Plaintiff *already* has adequately articulated his excessive
8 force claims. See Rand, 113 F.3d at 1525; Shelton, 2007 WL 3146999 at
9 *4. Moreover, the case as detailed in the Complaint and subsequent
10 filings is not unusually complex.

11 To the extent Plaintiff expresses concerns about his ability to
12 obtain discovery, these issues are not ripe for review as Plaintiff has
13 not yet attempted to obtain any of the discovery he details in his
14 motion or filed any motions related thereto. Moreover, the Ninth
15 Circuit addressed just these types of concerns over a decade ago in
16 response to an appeal by a *pro se* prisoner pursuing a section 1983
17 action. The prisoner argued that "had he had the assistance of counsel
18 during the early stages of the proceedings, he may well have fared
19 better-particularly in the realms of discovery and the securing of
20 expert testimony." Rand, 113 F.3d at 1525. In response, the Ninth
21 Circuit explained that "this is not the test" because "any *pro se*
22 litigant certainly would be better served with the assistance of
23 counsel." Id. The Court reconfirmed that the "test" for appointment
24 of counsel is a prisoner's demonstration of "exceptional circumstances"
25 based on likelihood of success on the merits and the ability to
26 articulate his claims. Id.

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1 For the foregoing reasons, the Court find that Plaintiff has not
2 alleged the requisite "exceptional circumstances" and hereby **DENIES**
3 Plaintiff's motion for reconsideration [Doc. No. 20] **WITHOUT PREJUDICE**.

4 **IT IS SO ORDERED.**

5 DATED: May 9, 2008

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7 BARBARA L. MAJOR
8 United States Magistrate Judge
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11 COPY TO:

12 HONORABLE WILLIAM Q. HAYES
13 U.S. DISTRICT JUDGE

14 ALL COUNSEL
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